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DIVISION OF POMOLOGY
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Horticultural Statutes of California

With Court Decisions and Legal Opinions Relating Thereto

Compiled by the
State Board of Horticulture

CALIFORNIA'S

HORTICULTURAL STATUTES

WITH

COURT DECISIONS AND LEGAL OPINIONS RELATING THERETO.

Compiled by the
STATE BOARD OF HORTICULTURE.



SACRAMENTO:
A. J. JOHNSTON : : : SUPERINTENDENT STATE PRINTING.
1901.

SB983
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1901

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HORTICULTURAL STATUTES OF CALIFORNIA.

An Act to create and establish a State Board of Horticulture.

(Approved March 13, 1883; amended by an Act approved March 8, 1889.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. There shall be a State Board of Horticulture, consisting of nine members, who shall be appointed by the Governor; two from the State at large, and one from each of the seven horticultural districts, which are hereby constituted as follows:

First—The Sonoma District, which shall include the counties of Sonoma, Marin, Lake, Mendocino, Humboldt, Del Norte, Trinity, and Siskiyou.

Second—The Napa District, which shall include the counties of Napa, Solano, and Contra Costa.

Third—The San Francisco District, which shall include the City and County of San Francisco, and the counties of San Mateo, Alameda, Santa Clara, Santa Cruz, San Benito, and Monterey.

Fourth—The Los Angeles District, which shall include the counties of Los Angeles, Ventura, Santa Barbara, San Luis Obispo, San Bernardino, and San Diego.

Fifth—The Sacramento District, which shall include the counties of Sacramento, Yolo, Sutter, Colusa, Butte, Tehama, and Shasta.

Sixth—The San Joaquin District, which shall include the counties of San Joaquin, Stanislaus, Merced, Fresno, Tulare, and Kern.

Seventh—The El Dorado District, which shall include the counties of El Dorado, Amador, Calaveras, Tuolumne, Mariposa, Placer, Nevada, Yuba, Sierra, Plumas, Lassen, Modoc, Alpine, Mono, and Inyo.

NOTE.—The amendments to the original Act appear in brackets.

SEC. 2. The members appointed from each district shall be residents of the district from which they are appointed, and shall be specially qualified by practical experience and study in connection with the industries dependent upon horticulture. They shall each hold office for the term of four years, except that of the nine first appointed, four, to be determined by lot, shall retire at the end of two years, when their successors shall be appointed by the Governor.

SEC. 3. [The Board shall biennially elect a President, a Vice-President, a Chairman of the Finance Committee, and appoint from without their own number, a Secretary, who shall be ex officio Horticultural Officer, and elect of their own number a Treasurer, who shall give a bond to the State, with sureties approved by the Board, in the sum of ten thousand dollars, for the faithful discharge of his duties.]

SEC. 4. The Board may receive, manage, use, and hold donations and bequests for promoting the objects of its formation. It shall meet semi-annually, and as much oftener and at such places as it may deem expedient, to consult and adopt such measures as may best promote the horticultural industries of the State. It may, but without expense to the State, select and appoint competent and qualified persons to lecture in each of the horticultural districts named in section one of this Act, for the purpose of illustrating practical horticultural topics, and imparting instruction in the methods of culture, pruning, fertilizing, and also in the best methods of treating the diseases of fruit and fruit trees, cleansing orchards, and exterminating insect pests. The office of the Board shall be kept open to the public, subject to the rules of the Board, every day, excepting legal holidays, and shall be in charge of the Secretary during the absence of the Board.

SEC. 5. For the purpose of preventing the spread of contagious disease among fruit and fruit trees, and for the prevention, treatment, cure, and extirpation of fruit pests and the diseases of fruit and fruit trees, and for the disinfection of grafts, scions, orchard débris, empty fruit boxes and packages, and other suspected material or transportable articles dangerous to orchards, fruit and fruit trees, said Board shall make regulations for the inspection and disinfection thereof, which said regulations shall be circulated in printed form by the Board among the fruit-growers and fruit-dealers of the State, shall be published at

least twenty days in two daily newspapers of general circulation in the State not of the same city or county, and shall be posted in three conspicuous places in each county in the State, one of which shall be at the county court-house thereof. Such regulations when so posted shall be held to impart notice of their contents to all persons within this State and shall be binding upon all persons.

SEC. 6. [Said board shall appoint without their number a competent person, especially qualified for the duties of his office, who shall be known as Clerk of the Publishing and Quarantine Bureau of the State Board of Horticulture (to hold office at the pleasure of the Board), who shall be qualified, by experience and education as a compiler, to correct reports and essays; to present in a logical order all the information to be published, and shall give his whole time in such work, and such other duties as may be required of him by the Board and by reason of his official position, and shall have power to enforce all rules and regulations regarding the spread of insect pests, quarantining districts or nurseries found to be infected. He shall be paid for his services as Clerk of the Publishing and Quarantine Bureau of the State Board of Horticulture, one hundred and seventy-five dollars per month, to be paid as other State officers.]

SEC. 7. [The said Board, and in case of necessity during the recess of the Board, the said Clerk of the Publishing and Quarantine Bureau, may appoint such Quarantine Guardians as may be needed to carry out the provisions of this Act, whose duties it shall be to see that the regulations of the Board and the instructions of the Clerk of the Publishing and Quarantine Bureau are enforced and carried out; said Clerk may appoint, in case of emergency, a deputy, who shall have the same power as his own, whose salary shall not exceed three dollars per day for each day's service performed, said services to be paid by the State Board of Horticulture. The said Quarantine Guardians shall report to the said Clerk, or to the State Board, all infractions or violations of said directions, regulations, and of the law in regard to quarantine, disinfection, and destruction of insect and other pests injurious to fruit, fruit trees, or vines, and precautions against the spreading of all the aforesaid named pests and diseases. The salary of Quarantine Guardian shall not exceed three dollars per day, and shall be paid by the owners

of orchards and other places and localities under quarantine regulations; and they may maintain an action therefor before any Justice of the Peace in any township in which any quarantined locality is wholly or in part situated, but in no case shall they have any claim upon the State for such services.]

SEC. 8. [It shall be the duty of the Secretary to attend all meetings of the Board and of the Executive Committee and to preserve records of its proceedings and correspondence; to collect books, pamphlets, and periodicals, and other documents containing information relating to horticulture, and to preserve the same; to collect statistics and other information showing the actual condition and progress of horticulture, in this State and elsewhere; to correspond with agricultural and horticultural societies, colleges, and schools of agriculture and horticulture, and other persons and bodies, as he may be directed by the Board; and prepare, as required by the Board, reports for publication. He shall appoint, subject to the approval of the Board, a competent person as clerk, and he shall be held responsible for the acts of said clerk. He shall be paid for his services as such Secretary and ex officio Horticultural Officer, a salary of one hundred and seventy-five dollars per month. His clerk shall be paid a salary (as such clerk) of fifty dollars per month. each to be paid as other State officers.]

SEC. 9. (Repealed.)

SEC. 10. The Board shall, biennially, in the month of January, report to the Legislature a statement of its doings, with a copy of the Treasurer's accounts for the two years preceding the session thereof, and abstracts of the reports of the Inspector of Fruit Pests, and Secretary.

SEC. 11. The Treasurer shall receive all moneys belonging to the Board, and pay out the same only for bills approved by it, and shall annually render a detailed account to the Board.

SEC. 12. (Relates to appropriations which are provided by the Legislature every two years.)

SEC. 13. This Act shall take effect and be in force from and after its passage, and all Acts or parts of Acts inconsistent or in conflict with the provisions of this Act are hereby repealed.

SEC. 14. [The President (and in his absence the Vice-President) and the two Commissioners for the State at large, shall constitute the Executive Committee; said committee shall have

charge of the management of the affairs of the Board while the Board in not in session. The members of said committee shall receive their actual traveling expenses in attending quarterly meetings of the Executive Committee. The other members of the Board shall receive their actual traveling expenses (only) in attending semi-annual meetings of the Board.]

SEC. 15. [Vacancies occurring in any office shall be filled by appointment made by the President of the Board, with the consent of the Executive Committee, until the next meeting of the Board.]

SEC. 16. [The Board shall make and publish their reports annually.]

SEC. 17. [It shall be the duty of the County Boards of Horticulture to make quarterly reports, in writing, to the State Board of the condition of fruit interests in their several districts, what is being done to eradicate insect pests, also as to disinfecting, and as to quarantine against new insects, and as to carrying out of all laws relative to the greatest good of the fruit interest. Said Board shall publish said reports in bulletin form, or may incorporate so much of the same in their annual reports as may be of general interest.]

SEC. 18. [The expenditures necessary to be made in experiments in the different districts shall be determined by the Board. On application of one or more of the fruit-growers in such districts, the said Board shall select such person or persons to make such experiments, and pay the expenses thereof. The sum of not exceeding one thousand dollars, for traveling expenses, shall be allowed when the Board or the Executive Committee shall deem it necessary to send either the Clerk of Bureau or Secretary to direct and supervise such experiments; *provided*, that not more than one thousand dollars be expended in any one year for such traveling expenses.]

LAW RELATING TO COUNTY BOARDS OF HORTICULTURE.

An Act to promote the horticultural interests of the State by providing County Boards of Horticulture, and repealing the Act entitled "An Act to protect and promote the horticultural interests of the State," approved March 14, 1881, and certain Acts amendatory thereof, approved March 19, 1889, and March 31, 1891.

[Approved March 31, 1897.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever a petition is presented to the Board of Supervisors of any county, and signed by twenty-five or more persons, each of whom is a resident freeholder and possessor of an orchard, stating that certain or all orchards, or nurseries, or trees of any variety are infested with scale insects of any kind, injurious to fruit, fruit trees, and vines, codling moth, or other insects that are destructive to trees, and praying that a commission be appointed by them, whose duty it shall be to supervise the destruction of said scale insects, as herein provided, the Board of Supervisors shall, within twenty days thereafter, appoint a Board of Horticultural Commissioners, consisting of three members, who shall be qualified for the duties of Horticultural Commissioner. Upon the petition of twenty-five resident freeholders and possessors of an orchard, the Board of Supervisors may remove any of said commissioners for cause, after a hearing of the petition.

SEC. 2. It shall be the duty of the County Board of Horticultural Commissioners in each county, whenever it shall deem it necessary, to cause an inspection to be made of any orchards, or nursery, or trees, plants, vegetables, vines, or fruits, or any fruit packing-house, storeroom, salesroom, or any other place or articles in their jurisdiction, and if found infested with scale insects, or codling moth, or other pests injurious to fruit, plants, vegetables, trees, or vines, or with their eggs or larvæ, they shall notify the owner or owners, or person

or persons in charge, or in possession of the said places, or orchards, or nurseries, or trees, or plants, vegetables, vines, or fruit, or articles as aforesaid, that the same are infested with said insects, or other pests, or any of them, or their eggs or larvæ, and they shall require such person or persons to eradicate or destroy the said insects, or other pests, or their eggs or larvæ, within a certain time to be specified. Said notices may be served upon the person or persons, or either of them, owning, or having charge, or having possession of such infested place, or orchard, or nursery, or trees, plants, vegetables, vines, or fruit, or articles as aforesaid, by any commissioner, or by any person deputed by the said commissioners for that purpose, or they may be served in the same manner as a summons in a civil action. Any and all such places, or orchards, or nurseries, or trees, plants, shrubs, vegetables, vines, fruit, or articles thus infested, are hereby adjudged and declared to be a public nuisance; and whenever any such nuisance shall exist at any place within their jurisdiction, or on the property of any non-resident, or on any property the owner or owners of which cannot be found by the County Board of Horticultural Commissioners, after diligent search, within the county, or on the property of any owner or owners upon which notice aforesaid has been served, and who shall refuse or neglect to abate the same within the time specified, it shall be the duty of the County Board of Horticultural Commissioners to cause said nuisance to be at once abated, by eradicating or destroying said insects, or other pests, or their eggs or larvæ. The expense thereof shall be a county charge, and the Board of Supervisors shall allow and pay the same out of the general fund of the county. Any and all sum or sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated, in pursuance of this Act, and may be recovered by an action against such property and premises. A notice of such lien shall be filed and recorded in the office of the County Recorder of the county in which the said property and premises are situated, within thirty days after the right to the said lien has accrued. An action to foreclose such lien shall be commenced within ninety days after the filing and recording of said notice of lien, which action shall be brought in the proper court by the District Attorney of the county, in the name and for the benefit of the

county making such payment or payments, and when the property is sold, enough of the proceeds shall be paid into the county treasury of such county to satisfy the lien and costs; and the overplus, if any there be, shall be paid to the owner of the property, if he be known, and, if not, into the court for his use when ascertained. The County Board of Horticultural Commissioners is hereby vested with power to cause any and all such nuisances to be at once abated in a summary manner.

SEC. 3. Said County Boards of Horticultural Commissioners shall have power to divide the county into districts, and to appoint a local inspector, to hold office at the pleasure of the commissioners, for each of said districts. The State Board of Horticulture may issue commissions as quarantine guardians to the members of said County Board of Horticultural Commissioners and to the local inspectors thereof. The said quarantine guardians, local inspectors, or members of said County Boards of Horticultural Commissioners, shall have full authority to enter into any orchard, nursery, place or places where trees or plants are kept and offered for sale or otherwise, or any house, storeroom, salesroom, depot, or any other such place in their jurisdiction, to inspect the same, or any part thereof.

SEC. 4. It shall be the duty of said County Board of Horticultural Commissioners to keep a record of their official doings, and to make a report to the State Board of Horticulture, on or before the first day of October of each year, of the condition of the fruit interests in their several districts, what is being done to eradicate insect pests, also as to disinfecting, and as to quarantine against insect pests and diseases, and as to carrying out all laws relative to the greatest good of the fruit interest. Said Board may publish said reports in bulletin form, or may incorporate so much of the same in their annual reports as may be of general interest.

SEC. 5. The salary of all inspectors working under the County Board of Horticultural Commissioners shall be two dollars and fifty cents ($2.50) per day. In the case of the commissioners themselves, their compensation shall be four dollars per day, when actually engaged in the performance of their duties, and itemized necessary traveling expenses incurred in the discharge of their regular duties as prescribed in this Act.

SEC. 6. It shall be the duty of the County Board of Horticultural Commissioners to keep a record of their official doings and make a monthly report to the Board of Supervisors; and the Board of Supervisors may withhold warrants for salaries of said members and inspectors thereof until such time as said report is made.

SEC. 7. An Act entitled "An Act to protect and promote the horticultural interests of the State," approved March fourteenth, eighteen hundred and eighty-one, and certain Acts amendatory thereof, approved March nineteenth, eighteen hundred and eighty-nine, and March thirty-first, eighteen hundred and ninety-one, are hereby repealed.

SEC. 8. This Act shall take effect and be in force from and after its passage.

HORTICULTURAL QUARANTINE LAW.

An Act for the protection of horticulture, and to prevent the introduction into this State of insects, or diseases, or animals, injurious to fruit or fruit trees, vines, bushes, or vegetables, and to provide for a quarantine for the enforcement of this Act.

[Became a law, under constitutional provision, without Governor's approval, March 11, 1899.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any person, persons, or corporation, who shall receive, bring, or cause to be brought into this State any nursery stock, trees, shrubs, plants, vines, cuttings, grafts, cions, buds, or fruit pits, or fruit or vegetables, shall, within twenty-four hours after the arrival thereof, notify the State horticultural quarantine officer, or the quarantine guardian of the district or county in which such nursery stock, or fruit, or vegetables are received, of their arrival, and hold the same without unnecessarily moving the same or placing such articles where they may be harmful, for the immediate inspection of such State horticultural quarantine officer or guardian. If

there is no quarantine guardian or State horticultural quarantine officer in the county where such nursery stock, or fruit, or vegetables are received, it shall then be the duty of such person, persons, or corporation to notify the State Board of Horticulture, who shall make immediate arrangements for their inspection. The State horticultural quarantine officer, the quarantine guardian, or such person, or persons, as shall be commissioned by the State Board of Horticulture to make such inspection, or to represent said board, are hereby authorized and empowered to enter into any warehouse, depot, or upon any dock, wharf, mole, or any other place, where such nursery stock, or fruit, or vegetables, or other described articles are received, for the purpose of making the investigation or examination herein provided for.

SEC. 2. Each carload, case, box, package, crate, bale, or bundle of trees, shrubs, plants, vines, cuttings, grafts, cions, buds, or fruit pits, or fruit or vegetables, imported or brought into this State, shall have plainly and legibly marked thereon in a conspicuous manner and place the name and address of the shipper, owner, or person forwarding or shipping the same, and also the name of the person, firm, or corporation to whom the same is forwarded or shipped, or his or its responsible agent, also the name of the country, State, or territory where the contents were grown.

SEC. 3. When any shipment of trees, shrubs, plants, vines, cuttings, grafts, cions, buds, fruit pits, or fruit or vegetables, imported or brought into this State, is found infested with injurious insects, or their eggs, larvæ, or pupæ, or infected with tree, plant, or fruit disease or diseases, the entire shipment shall be disinfected at the expense of the owner, owners, or agent. After such disinfection, it shall be detained in quarantine the necessary time to determine the result of such disinfection. If the disinfection has been so performed as to destroy all insects, or their eggs, and so as to eradicate all disease and prevent contagion, and in a manner satisfactory to the State horticultural quarantine officer, the quarantine guardian of the district, or the person commissioned by said board, the trees, vines, vegetables, seeds, or other articles shall then be released.

SEC. 4. When any shipment of trees, shrubs, plants, vines, cuttings, grafts, cions, buds, fruit pits, or fruit or vegetables,

imported or brought into this State, is found infested with any species of injurious insects, or their eggs, larvæ, or pupæ, not existing in the orchards, vineyards, gardens, or farms of California, such infested shipments shall be immediately sent out of the State, or destroyed, at the option of the owner, owners, or agent, and at his or their expense.

SEC. 5. No person, persons, or corporation, shall bring or cause to be brought into the State any peach, nectarine, or apricot trees, or cuttings, grafts, cions, buds, or pits of such trees, or any trees budded or grafted upon peach stock or root that has been in a district where the disease known as "peach yellows" or the contagious disease known as contagious "peach rosette" are known to exist, and any such attempting to land or enter shall be refused entry and shall be destroyed or returned to the point of shipment, at the option of the owner, owners, or agent, and at his or other [their] expense.

SEC. 6. No person, persons, or corporations shall bring, or cause to be brought into this State any injurious animals known as English or Australian wild rabbit, flying-fox, mongoose, or any animal or other animal or animals detrimental to horticultural and agricultural interests.

SEC. 7. Any person, persons, or corporation violating any of the provisions of this Act is guilty of a misdemeanor.

SEC. 8. This Act shall take effect and be in force from and after its passage.

COURT DECISIONS AND LEGAL OPINIONS ON THE HORTICULTURAL LAWS.

HORTICULTURAL LAW CONSTITUTIONAL.

Opinion of the Attorney-General.

By the Act of 1881, entitled "An Act to promote the horticultural interests of the State," it became incumbent on the County Boards of Supervisors to appoint County Boards of Horticultural Commissioners on presentation of a petition signed by twenty-five or more resident freeholders and possessors of orchards. A petition so signed was presented to the Board of Supervisors of Sonoma County, who refused to act thereunder, and mandamus proceedings were commenced against them. Prior to the commencement of the suit, however, the Secretary of the State Board of Horticulture applied to the Attorney-General for an opinion as to the constitutionality of the Act, and received the following reply:

OFFICE OF THE
ATTORNEY-GENERAL OF THE STATE OF CALIFORNIA,
SACRAMENTO, June 10th, 1889.

B. M. LELONG, ESQ.,
Secretary State Board of Horticulture, San Francisco:

DEAR SIR: Replying to your inquiry of 8th instant, I have to say that I regard the Act "to amend an Act entitled 'An Act to protect and promote the horticultural interests of the State,' approved March 14, 1881" (Statutes of 1889, page 413), constitutional. It is a later Act than the other Act to which you call my attention, approved March 7, 1889 (Statutes of 1889, page 89), and if there is any conflict between the two Acts, the later Act must prevail; but I do not wish to be understood as saying that there is any conflict.

I think the Board of Supervisors of Sonoma County, on the presentation of a proper petition, as required by the Act of March 19, 1889, should, within the time limited, select a County

Board of Horticultural Commissioners. Nor is it necessary for me at this time to give an opinion whether everything in the Act of March 19, 1889, is constitutional.

Very truly yours,

G. A. JOHNSON,
Attorney-General.

APPOINTMENT OF COUNTY BOARDS MANDATORY.

Decision of Superior Court of Sonoma County.

Upon this a mandamus suit was brought against the Board of Supervisors of Sonoma County; and Hon. John G. Pressley, Judge of the Superior Court of Sonoma County, on the 19th day of June, 1889, rendered the following decision, in which the validity of the Act directing the Boards of Supervisors to establish County Boards of Horticultural Commissioners is sustained:

E. A. ROGERS vs. THE BOARD OF SUPERVISORS OF SONOMA COUNTY.

John Goss, Esq., attorney for plaintiff.

On the 19th of March an Act of the Legislature was approved, entitled "An Act to amend an Act entitled 'An Act to protect and promote the horticultural interests of the State,' approved March 14, 1881."

This Act (of March, 1889) provides that, "Whenever a petition is presented to the Board of Supervisors of any county, and signed by twenty-five or more persons who are resident freeholders and possessors of an orchard, or both, stating that certain or all orchards or nurseries, or trees of any variety, are infested with scale insects * * * that are destructive to trees, and praying that a commission be appointed by them, whose duty it shall be to supervise their destruction, as herein provided, the Board of Supervisors shall, within twenty days thereafter, select three commissioners for the county, to be known as a County Board of Horticultural Commissioners."

The duties of the board so appointed are declared by the Act. It appears from the complaint that, in accordance with

this Act, a petition was presented to and filed with the Board of Supervisors, signed by this plaintiff and twenty-six other persons possessing the qualifications prescribed by the Act, praying for the appointment of a County Board of Horticultural Commissioners for Sonoma County, and a demand was made on the Supervisors that they carry into effect the provisions of the Act, and appoint the commissioners.

The Board refused to appoint commissioners.

Twenty days have expired since the filing of the petition and the demand for action upon it, and still the Board of Supervisors refuse and neglect to make any selections or appointment of commissioners.

This action is brought for a writ of mandate compelling the Board of Supervisors to make the selection and appointment as required of them by the Act.

A demurrer has been interposed to the complaint, and in support thereof it is contended:

First—That the Act of 14th of March, 1881, of which the Act of 19th of March is amendatory, was repealed by an Act approved 13th of March, 1883, which provides for the appointment by the Governor of a State Board of Horticulture, and that in consequence of the Act of 1889 being an amendment of a repealed statute, it is nugatory.

The Act of 1883 does not, in express terms, repeal the Act of 1881, nor is that Act elsewhere expressly repealed. It is a well-settled legal principle that repeals by implication are not favored. A subsequent Act does not, by implication, repeal a prior statute, unless the subsequent one entirely covers the provisions of the first, and so completely that every portion of the first is provided for by the second. There must appear an intent to entirely substitute one for the other.

Says Bishop in his work on Statutory Crimes, Section 154: "We have seen that every legislative Act in affirmative words is to be regarded, *prima facie*, as an addition to the mass of law; for such on its face it purports to be. Yet when it is inconsistent with the former law, it must, as the last expression of the legislative will, prevail. But repeals by implication, thus explained, are not favored. And a legislative intent to repeal an existing statute is never presumed. If two Acts, seeming to be repugnant, can be reconciled by any fair con-

struction, they must be, when no repeal will be held to take place."

The same principle is laid down by Judge Field in the case of *Pierrepont* vs. *Crouch*, 10 Cal. 316.

There are numerous other authorities to the same effect.

Is there any apparent intent to substitute one of these Acts for the other, or such repugnance as would destroy the first? Let us see. The first provides for a County Board of Horticulture. The second for a State board. The first prescribes duties to be performed by County Boards of Supervisors. The second prescribes duties to be discharged by the Governor. The first provides for a board of three commissioners with local jurisdiction. The second for a board of nine commissioners with a jurisdiction coëxtensive with the State. The first authorizes boards created by its authority to divide counties into districts. The second creates districts composed of several counties. The first requires duties to be performed by county boards which are not required by the second, of the State board. For instance: The first provides for proceedings against persons who, after notice, fail or refuse to treat infested trees as directed by the board, and a destruction of trees by such board when directed by a court. No such proceedings and destruction are provided for by the second. There are other differences between the two Acts which might be pointed out, but these are sufficient to show that there is no such similarity in the powers of the boards created by them as would necessarily cause a conflict between these boards, or would justify a court in holding that one Act repeals the other. I must, therefore, hold, that the Act of 1881 was not repealed by the Act of 1883, and was in full force when the amendatory Act of 1889 was passed. The Act of 1883 is an addition to the then existing legislation, and not a substitute for the Act of 1881.

Second—It was contended that Acts of the Legislature which provided that a duty imposed shall be performed within a certain time are directory and not mandatory. I cannot assent to that proposition. Where a court or board is directed by law to perform an act in a given time, the law, unless it declares the act may not be done after the expiration of the time, is so far directory as that the act is valid though done after the time fixed, but is not directory in the sense that the

duty or act directed may be entirely disregarded or omitted. The time is given that the board may have ample opportunity to act intelligently and with good judgment, but not to enable the board or officer of whom the duty is required to disregard it entirely. I have no doubt but that the Board of Supervisors is required by the law in question to appoint a County Board of Horticultural Commissioners, and that it may be lawfully done after the expiration of the twenty days given them in the Act for deliberation.

Counsel referred to some authorities from other States in support of his contention. I do not think these authorities go to the extent claimed by him, and if they did, there being no such decision by our own Supreme Court, I would hold the law in this State to be different. The purpose of the Legislature was to give the Supervisors time to make judicious selections, and not to justify or authorize an annulment of the legislative will expressed by the statute.

JOHN G. PRESSLEY, Judge.

ENFORCEMENT OF THE HORTICULTURAL QUARANTINE REGULATIONS.

In a case brought before the Superior Court of Los Angeles, the constitutionality of the Act of 1881, as amended, was questioned as to its enforcement, and upheld. It was an action brought to declare a shipment of orange trees from Tahiti a nuisance and have them destroyed, they being infested with injurious insects, etc. The findings of the court are as follows:

This is an action brought by the District Attorney of the County of Los Angeles, in the name of the people, for the condemnation, and abatement as a nuisance, of certain trees. The complaint alleges that in June, 1891, the defendants brought from Tahiti to San Pedro, in the County of Los Angeles, certain orange trees, numbering about 325,000, and that the same were, and still are, infested with scale insects and other pests injurious to fruit trees. That the Horticultural Commissioners of the County of Los Angeles notified defendants that the trees were so infested, and required them to eradicate and

destroy the insect pests thereon. That defendants caused the process of disinfection to be performed upon said trees, but said process was unsuccessful, and, although frequently repeated, has not eradicated or destroyed said insects. That among said insects is a scale insect hitherto unknown in the State of California, which cannot be destroyed by any process of disinfection; and that the said scale insects with which the trees are infested, if not destroyed, will be introduced into the orange orchards of California, and the orange industry greatly injured, if not totally destroyed. That the said scale insects cannot be destroyed without the destruction of said trees; that the defendants are contemplating the removal of said trees into the interior of the State of California, and that the said scale insects would be thereby distributed among other trees and propagated and spread all over the State of California. The complaint prays a judgment of the court that the trees be declared a nuisance and ordered to be destroyed.

Plaintiff relies, for its right to maintain the action, upon the provisions of the Act of the Legislature, approved March 19, 1891, declaring any orchards, trees, plants, or shrubs infested with insect pests injurious to plants, trees, etc., to be a nuisance, and also upon the theory that the trees in question are, under the general provisions of the Code, a public nuisance, and may be abated by an action brought in this manner.

It therefore becomes necessary for the Court to consider the power of the Legislature to adopt this statute, and the question whether, in the absence of statutory provisions, the action could be maintained.

My attention has not been directed to any constitutional limitation which affects the right of the Legislature to adopt a statute such as the one in question. The statute does not determine that any specific orchard or trees are a nuisance, but leaves it to the courts to determine whether there exists a condition of affairs which will make any particular trees a nuisance, and is, in my opinion, constitutional.

The law of nuisance, under our codes, is practically but a reënactment of the common law; and while this case is peculiar in its character and circumstances (being the first of the kind tried in the State), and in many respects utterly unlike any case to be found in the Reports, yet the duty to be performed

by the Court is the application of decisions disposing of cases widely differing from this as to the facts, but laying down principles which, by analogy, can be applied to the facts of this case.

It is peculiarly the characteristic of cases, under the law of nuisance, that they are largely dependent upon surroundings. The common law is not an iron-cast system, to which every case must be fitted without regard to its particular circumstances, but is a system which derives its beauty and utility from the fact that it is the condensation of the wisdom and learning of centuries, modified from time to time by the circumstances of period and place. In the consideration of any case which is dependent, to a greater or less degree, upon the circumstances and surroundings of the community and State, it is the duty of the Court to take into consideration the condition and development of the industries which may be affected by its judgment, for the purpose of properly applying the rules of law to the circumstances of the case. The Court, therefore, in applying the principles of the common law and the decisions thereunder, takes into consideration all the facts to which those decisions and principles are to be applied.

"That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner, does not make it any less the common law; for the latter is a system of grand principles, founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatever. Having, as far as we have gone, met all difficulties by adhering to its doctrines, we have no ground to presume that we will have to go beyond its precincts for a solution of any which may arise. Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law." (*Conger* vs. *Weaver*, 6 Cal. 548.)

The Court, therefore, takes judicial notice of the history, development, and character of the industries of California; of the fact that the production of fruits is one of the leading occupations in this State, and that a large portion of the people

are dependent upon it. It takes judicial notice of the fact that a large portion of the land in this and adjoining counties is devoted to the cultivation of citrus fruits, and that the annual production and shipment of oranges is very great, and that the spread of any insect pest injurious to citrus trees must necessarily result in serious injury to that business and in great loss and destruction of property.

That orchards and trees infested by scale or insect pests injurious to vegetation and which will easily spread to other places, must be a nuisance, *prima facie*, seems too clear to require discussion, and would not receive it at the hands of this Court but for the fact that this is the first case of this kind.

"A nuisance is anything that worketh hurt, inconvenience, or damage." (Black, vol. 3, p. 213.)

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Sec. 3479, C. C.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Sec. 3480, C.C.)

The kinds of nuisances which have been abated are almost innumerable in variety, each dependent upon the particular character and circumstances under which it exists.

In the case of *Campbell* vs. *Seaman*, 63 N. Y. 568, the use of bituminous coal, which produced vapors injurious to vegetation, was held to be a nuisance. Again, a house in so ruinous a condition as to be likely to fall upon the house of another is a nuisance. (*Tenant* vs. *Goldwin*, 2 Ld. Raymond, 1893.) Buildings in an unsafe condition in a public street are common nuisances. (Wood's Law of Nuisances, p. 8.) Production of vapors injurious to vegetation is a nuisance. (Wood's Law of Nuisances, Sec. 536, *et seq.*)

It has been argued by defendant's counsel that a prospective nuisance will not be abated, and the authorities cited by them would be conclusive in this case if applicable to its facts. But the fallacy of their argument is that in the cases cited by them

no considerable injury could be done until the actual existence of a nuisance could be shown. In the case at bar, before damage could be actually shown, it would be necessary for the scale insects in question to be disseminated through a considerable portion of the orchards of the State and their propagation have reached a stage at which it would be extremely difficult, if not impossible, to check and eradicate them.

It appears to me that this case belongs to that class in which, if the allegations of the complaint are true, a damage will be inferred, and it is not necessary to wait until it is actually done. It is similar in that respect to the cases in which diseased animals are taken to public places when there is danger of infection, to the cases of the storing of explosives, and to the cases of condemnation of dangerous buildings and places likely to be injurious to the health of the community—in all of which the abatement of the nuisance rests merely upon the reasonable apprehension of danger. The fact that the trees are at San Pedro does not prevent their being considered an existing nuisance, as the evidence shows that the larvæ of the scale may be carried by birds, insects, and the winds to distant portions of the county and State.

The evidence in the case shows that at the time of the arrival of the trees at San Pedro they were infested with eight different varieties of pests, and that subsequently they were treated six times with different processes for the destruction of the scale; that the treatment was successful as to all kinds except a species of scale hitherto unknown in California, called the mining scale or *Chionaspis biclavis;* and that all efforts to eradicate this scale have been unsuccessful, and seem to have been abandoned by defendants.

The evidence with regard to this scale is entirely that of expert witnesses, who, never having seen it before, are unable to testify positively as to its effects, other than from their opinion derived from familiarity with the cultivation of the orange, from experience with the other scale insects similar in character with which orange trees are infested, and from their observation of this insect found upon the trees in question. The evidence and the inspection of the Court, however, show positively that the mining scale derives its nutrition and support entirely from the tree, and consequently must be injurious in a greater or less degree. The expert witnesses all agree in

the opinion that it is injurious to the health of the tree, and that if introduced into the State it would occasion great injury to the orange orchards.

An entomologist and agent of the Department of Agriculture testified that he had made an examination of the trees at San Pedro, and found the mining scale upon them in a healthy condition on the day before the trial of the cause; that he did not know of its existence elsewhere in the State, and that there could be no doubt about its being detrimental, living at the expense of the tree. He was of the opinion that by some process the scale might be destroyed without the destruction of the trees, but was unable to give any method by which it could be done.

Alexander Craw, Quarantine Officer of the State Board of Horticulture, testified that he had inspected the trees eight or ten times, examined the scale in question, and found the live scale and larvæ. In his opinion the mining scale could not be destroyed without destroying the trees. He considered it a very destructive scale, and knew of no way by which it could be eradicated except by destroying the trees. It was, in his opinion, a more dangerous insect than the cottony-cushion scale, and would be very injurious to the orange industry.

The other witnesses testified substantially to the same opinions as those given by Mr. Craw.

The trees in question, now reduced in number to about 60,000, are contained in crates at San Pedro; and the evidence shows that, in an examination of the trees at this time, live scale is found on only a portion of the trees, but that a thorough examination would require five or ten minutes for each tree.

The evidence establishes all the allegations of the complaint, being open only to the objection that it is to a great extent merely expert opinion. But, under the circumstances, that is the best evidence of which the case is susceptible.

This evidence is practically uncontradicted by the defense, as no witness has been produced who claims to know any process by which this scale can be destroyed, or that it is not injurious.

The defense claims that the trees should be separated, and only those upon which the scale are found be destroyed. There is no doubt that the position of the defendants is correct, that in abating a nuisance no more property should be destroyed

than is absolutely necessary for that purpose. But in this case the situation of these trees is such that there is no certainty that all are not infested, and if such separation can be made it should be done by defendants.

The period during which the case has been pending was sufficient to give the defense every opportunity to disinfect these trees.

From the evidence of the experts, and in the absence of any suggestion of a method by which the trees can be disinfected, the Court must conclude that it cannot be done without the destruction of the trees.

It therefore follows that the allegations of the complaint are sustained by the evidence. The Court is of the opinion that the statute of March 19, 1891, is constitutional, and that even in the absence of such a statute the trees in question are a nuisance under the Code, and that plaintiff is entitled to the relief demanded in the complaint.

Let findings and judgment be submitted in accordance with this opinion.

J. W. McKINLEY,
Judge.

CONSTITUTIONALITY OF HORTICULTURAL LIENS.

L. A. No. 486. Department Two. November 11, 1899.

COUNTY OF LOS ANGELES, *Appellant*,
vs.
W. D. SPENCER ET AL., *Respondents*.

ACT TO PROTECT HORTICULTURE—TITLE.—Every provision of the Act of 1881, page 88, entitled "An Act to protect and promote the horticultural interests of the State," and of the Acts amendatory thereof, is germane to the subject-matter expressed in its title, and is properly embraced therein.

ID.—HORTICULTURAL COMMISSIONERS—POWER TO DETERMINE NUISANCE—JUDICIAL POWER—POLICE POWER.—The power given by such Act to the Horticultural Commissioners to determine whether any particular place is a nuisance and to abate the same is not a judicial power, within the meaning of the inhibition of Article III of the Constitution; and the Act is a proper exercise of the police power within the meaning of Section 1 of Article XIX of the Constitution.

ID.—PUBLIC NUISANCES—INFECTED PLACES—INSECT PESTS.—The Legislature has the power to declare that to be a nuisance which is such in fact, and the places declared by such Act to be public nuisances, to wit: "All places, orchards, nurseries," et cetera, infected with "scale insects or codling moth, or other pests injurious to fruit, plants," et cetera, are clearly such within the definition of that term as used in Sections 3479 and 3480 of the Civil Code.

ID.—LIEN FOR ABATING NUISANCE.—The lien given by the statute upon the premises from which such nuisance has been abated, for the expenses of abating it, is not for a delinquent tax, but for an indebtedness due the county, and its enforcement in the way prescribed by the statute is not unconstitutional.

Appeal from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion.

J. A. Donnell and William P. James, for Appellant.

Tanner & Taft, and Gardiner, Harris & Rodman, for Respondents.

GRAY, C. The plaintiff appeals from a judgment following an order sustaining a demurrer to an amended complaint without leave to further amend.

The amended complaint purports to set out a cause of action to foreclose a lien for the expense of abating an insect pest nuisance in defendants' orchard. This lien is claimed to exist by virtue of an Act entitled "An Act to protect and promote the horticultural interest of the State," and Acts amendatory thereof and additional thereto. The Act in question may be found in the Statutes of 1881, page 88, and the amendments and additions thereto in the Statutes of 1889, page 413, and the Statutes of 1891, pages 260 and 268. In sustaining the demurrer without leave to amend, the learned Judge of the court below filed an opinion, in which the principal reason assigned for the action of the court is that the Act in question is unconstitutional, and this, also, is the main reason urged on this appeal in support of the judgment. It is said, first, that the Act embraces more than one subject grouped under one title. The Act as amended provides for the appointment, by the Board of Supervisors of any county in the State to whom the required petition is presented, of a horticultural commission of not exceeding three members. It also prescribes the length of the terms of office of said commissioners and the manner of filling vacancies therein. It then defines the duties

and powers of the Board of Horticultural Commissioners, fixes their compensation, and provides for their removal. It makes the expense of removing or abating an insect pest nuisance from any property infested thereby a lien upon the property or premises from which such nuisance has been abated. All the duties and powers conferred upon said board appertain to the abating of those insect pest nuisances which interfere with the business of horticulture.

From this brief summary it will be readily seen that every provision of the Act points directly to the protection and promotion of the horticultural interests of the State, and hence all said provisions relate to but one subject and may be properly grouped in one Act under the very appropriate title of "An Act to protect and promote the horticultural interests of the State." This view seems to be supported by the following cases therein cited: *Ex parte Liddell*, 93 Cal. 633; *Abeel* vs. *Clark*, 84 Cal. 226.

It is urged that the Act in question is unconstitutional and invalid because it confers judicial powers upon the Horticultural Commissioners, contrary to Article III of the State Constitution; but we do not think that this contention can be maintained. This provision of the Constitution must be understood as construed by judicial decisions, and with reference to the subject of police power. The Act itself defines the nuisances to which it relates and declares that "all places, orchards, nurseries," et cetera, infected with "scale insects, or codling moth, or other pests injurious to fruit, plants," et cetera, are public nuisances. In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid. Ordinances prohibiting the erection of wooden buildings within fire limits except upon the order of fire commissioners; giving viticultural commissioners power to prohibit the importation of diseased vines; prohibiting the carrying on of a public laundry without a certificate of the health officer and of the board of fire wardens; prohibiting retail liquor business without permission of the board of police commissioners;

giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any rubbish should be deposited; forbidding orations, harangues, et cetera, in a park without consent of the park commissioners, or upon other grounds except by permission of the city government committee; beating drums, et cetera, without permission of the president of the village; prohibiting manufacturers and others from ringing bells, et cetera, except at such times as the board of aldermen may designate; authorizing harbormasters to station vessels and to assign each its place; forbidding the keeping of swine without a permit from the board of health; and giving to boards of health, quarantine officers, and milk inspectors discretion as to the exercise of police powers—all such laws and ordinances have been judicially held to be valid, although they confer the same power upon designated public officers as is given by the Act here in question to the commissioners. (*Ex parte Ah Fook*, 49 Cal. 402; *In re Flaherty*, 105 Cal. 558, and cases there cited; *Ex parte Fiske*, 72 Cal. 125; *Bittenhaus* vs. *Johnston*, 92 Wis. 588; *Train* vs. *Boston Disinfecting Co.*, 114 Mass. 523, 59 Am. Rep. 113; *Newton* vs. *Joyce*, 166 Mass. 83.) The efficiency of many police regulations depends upon their prompt and summary execution; and therefore, from necessity, certain discretion must be given to the officers who are to make the regulations effective. In *Ex parte Ah Fook, supra*, this Court said: "It is obvious that to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws it must be prompt and summary, and we are not aware that any reasonable provisions of the statute clothing such officers or boards with enlarged powers often exercised by them have ever been held unconstitutional." In the case at bar, the acts of the commissioner are not clothed with that sanctity and protection which accompanies the judicial acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office. And then, again, the lien in question here could not be enforced until after a judicial investigation and determination by a court.

Beyond any question the Legislature has the power to declare that to be a nuisance which is such in fact, and we think it safe to assert that everything declared to be a public nuisance

in the Act in question comes clearly within the meaning of that term as defined in the Civil Code, Sections 3479 and 3480.

It is known that the existence of the fruit industry in the State depends upon the suppression and destruction of the pests mentioned in the statute. The Act in question is, therefore, a proper exercise of the police power which the Legislature has, under Section 1 of Article XIX of the Constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the State. (*Abeel* vs. *Clark*, *supra; Train* vs. *Boston Disinfecting Co.*, *supra.*) In this connection, it may be well to observe that the statute does not authorize any injury to or destruction of property, but, on the contrary, its provisions are beneficial to the very property upon which it operates.

The lien given by the statute is not for a delinquent tax, but for an indebtedness due the county, and the enforcement of it in the way prescribed by the statute is not obnoxious to any constitutional inhibition.

The case of *Boorman* vs. *Santa Barbara*, 65 Cal. 313, and the other California cases cited by respondent to show that private property cannot be subject to burdens without due process of law, are sound in principle, but as to the matter of notice the statute here under consideration is not like any of the statutes in those cases. The subject of those statutes, street improvements, does not naturally call for such prompt and immediate action as might be necessary in the abatement of a contagious nuisance like that treated of in the statute here in question. (*Surocca* vs. *Geary*, 3 Cal. 69; 58 Am. Dec. 385.)

We discover no conflict with any constitutional provision in the Act under consideration as finally amended in 1891.

For the foregoing reasons we advise that the judgment be reversed and the cause remanded.

We concur:

CHIPMAN, C.
HAYNES, C.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

McFARLAND, J.
TEMPLE, J.
HENSHAW, J.

Hearing in bank denied.

THE RIVERSIDE CASE.

Arthur Butcher, of Riverside, the owner of an orange orchard infested with red scale, upon being notified to fumigate the same by the County Board of Horticultural Commissioners, refused to do so. Under the law the board proceeded to fumigate the orchard, and the expense was paid out of the general fund of the county in the sum of $196.46.

The District Attorney at once began suit to declare the sum a lien on the orchard and real estate of Mr. Butcher, and the case was heard before Superior Judge Noyes of Riverside County, in November, 1899, and Judge Noyes followed the opinion of the Superior Court of Los Angeles County in the Spencer case, which had recently held the law unconstitutional, as too arbitrary in selling real estate for such purposes. The Los Angeles case and also the Riverside case were both appealed to the Supreme Court, and both have been reversed. The Supreme Court decided both cases on the theory that as the fruit industry is so important, and the destructiveness of scale so deadly, no citizen should be allowed to permit the growth and spread of the pests; and while the penalty of loss of land is severe, it is just.

In the Superior Court of the County of Riverside, State of California.

THE COUNTY OF RIVERSIDE, *Plaintiff*,
vs.
ARTHUR BUTCHER, *Defendant*.
} **COMPLAINT.**

Plaintiff complains and alleges:

I. That at all the times hereinafter mentioned plaintiff was and now is a duly organized county of the State of California.

II. That at all the times hereinafter mentioned there was and still is a duly appointed, qualified, and acting Board of Horticultural Commissioners for said county, consisting of three members. That a petition was presented to the Board of Supervisors of Riverside County, signed by more than

twenty-five persons, each of whom was a resident freeholder of said county and possessor of an orchard, stating that certain orchards of said county were infested with scale insects destructive to fruit trees, and praying that a commission be appointed by said Supervisors to supervise the destruction of said scale insects; and within twenty days after said petition was presented said Board of Supervisors appointed three persons qualified to perform the duties of Horticultural Commissioners.

III. That the defendant herein, Arthur Butcher, at all times hereinafter mentioned was and still is the owner in fee of the following described real estate, situated in the County of Riverside, State of California, to wit: All of lot 233 and fractional lot 236 as the said lots are delineated on the map of the lands of the Southern California Colony Association on file in the office of the County Recorder of San Bernardino County, California.

IV. That at all the times herein mentioned there was and is standing and growing on said land a fruit-bearing orchard consisting of orange trees, the property of said defendant.

V. That on the 22d and 23d days of August, 1898, the said Board of Horticultural Commissioners, pursuant to the statute in such cases made and provided, caused an inspection of said orchard to be made, and found the same to be infested with red scale insects that are destructive to trees, and by law declared to be a public nuisance; that thereafter, to wit, on the 24th day of August, 1898, the said fruit trees being still infested with said scale as aforesaid, the said Board of Horticultural Commissioners caused a notice to be served upon W. Miller, the person in charge of and in possession of said premises and orchard for the defendant as his agent, requiring said defendant and agent to eradicate or destroy the said scale and insects so found upon said trees within ten days after the service of said notice. A copy of said notice is hereto attached and made a part of this complaint as "Exhibit B."

VI. That notwithstanding said requirement was made by the said Board of Horticultural Commissioners upon the said defendant to eradicate or destroy said scale as aforesaid within ten days after the service of said notice, the said defendant wholly neglected and refused to eradicate or destroy said scale

within ten days after the service of said notice, or at any other time or at all.

VII. That thereafter, to wit, on the 20th to 25th days of September, 1898, the said Board of Horticultural Commissioners entered upon said premises and destroyed and eradicated the said scale so found upon said trees; that the expense incurred in eradicating and destroying said scale amounted to and was the sum of $196.46, which said sum the Board of Supervisors of the said plaintiff allowed and paid out of the general fund of the county on the 9th day of December, 1898.

VIII. That the said amount so paid by the said Board of Supervisors has never been repaid to the county by the defendant, or any other person, and is now due and wholly unpaid.

IX. That thereafter and within thirty days after the right of said lien had accrued, to wit, on January 7, 1899, the Board of Horticultural Commissioners caused a notice of a lien upon the above described real estate, as provided by law, to be filed and recorded in the office of the Recorder of said Riverside County, being the county in which said property and premises are situated, a copy of which notice of lien is hereto attached and made a part of this complaint as "Exhibit A."

Wherefore, plaintiff demands foreclosure of said lien, and that by judgment and order of this Court the said money so expended as aforesaid to eradicate said scale be declared to be a lien on said land, and that judgment may be entered against said land and defendant for said sum with costs, and that by said judgment it may be decreed that the said land shall be sold and that enough of the proceeds shall be paid into the county treasury of the plaintiff to satisfy the aforesaid lien and costs, and that the surplus, if any, be paid to the owner of the property if he be known, and if not, into the court for his use when ascertained.

LYMAN EVANS,
District Attorney, and Attorney for Plaintiff.

"EXHIBIT A."

Notice is hereby given that pursuant to the statutes in such cases made and provided, the Board of Horticultural Commissioners of the County of Riverside, State of California, between the —- day of ——, 189—, and the —— day of ——, 189—, caused to be destroyed and eradicated certain insects and other

pests injurious to fruit, plants, vegetables, trees, and vines, together with their eggs and larvæ, upon that certain orchard belonging to Arthur Butcher, and particularly described as being in the said County of Riverside, State of California, and known and described as all of lot 233 and fractional lot 236, as the said lots are situated on the map of the lands of the Southern California Colony Association, said map on file in the office of the County Recorder of the County of San Bernardino, State of California.

That the amount of labor bestowed and materials furnished for the purpose of eradicating said pests, as aforesaid, was of the amount of one hundred ninety-six and forty-six one hundredths dollars.

That said owner has wholly failed to pay any part of said sum for the eradication of said insects.

That thereafter and, to wit, on the 9th day of December, 1898, the said County of Riverside paid said sum of money for the eradication of said insects, pursuant to the provision of the statutes in such cases made and provided.

Wherefore, the County of Riverside claims the benefit of the law relative to liens of mechanics and others upon real property, to wit, Chapter 2, Title 4, Part 3, of the Civil Code of Procedure.

R. P. CUNDIFF,
W. F. BUDLONG,
Horticultural Commissioners.

STATE OF CALIFORNIA, }
County of Riverside. } ss.

W. F. Budlong, being duly sworn, deposes and says, that he is a Horticultural Commissioner in and for the County of Riverside; that he has read the foregoing notice and knows the contents thereof, and that the same is true; and that it contains (among other things) a correct statement of the demands in favor of the County of Riverside after deducting all just credits and offsets.

W. F. BUDLONG.

Subscribed and sworn to before me, this 7th day of January, 1899.

[SEAL] LYMAN EVANS,
Notary Public in and for the County of Riverside, State of California.

"EXHIBIT B."

OFFICE OF THE
COUNTY BOARD OF HORTICULTURAL COMMISSIONERS,
RIVERSIDE COUNTY, CALIFORNIA.

To ARTHUR BUTCHER, *Owner, Agent, Person in Charge*—W. MILLER, *in Charge:*

In accordance with the law, the undersigned Horticultural Commissioners of the County of Riverside, State of California, have caused an inspection to be made of your orchard and the trees thereon, located lots 233 and 236, lands of the Southern California Colony Association, in the City and County of Riverside and State of California, in said county.

Said inspection was made on the 22d and 23d days of August, 1898, and upon said inspection 281 orange trees were found to be infested with red scale injurious to fruit and fruit trees. Said insect pests are by law declared to be a public nuisance.

Therefore, in accordance with Section 2 of an Act to promote the horticultural interests of the State, by providing County Boards of Horticulture,

approved March 31, 1897, you are hereby notified that your orchard and trees, described above, are infested with red scale injurious to fruit and fruit trees, and that said red scale is a public nuisance, and you are hereby required to eradicate or destroy the said red scales or other pests, and their eggs and larvæ, within ten days of the time of the service on you of this notice.

Should you neglect or refuse to comply with the requirements of this notice, it will be the duty of the County Board of Horticultural Commissioners to cause said nuisance to be at once abated by eradicating or destroying said insects or other pests, or their eggs or larvæ. The expenses thereof will become a lien upon the above described premises, and an action to foreclose the said lien will be brought in the proper court within ninety days thereafter, by the District Attorney.

Dated this 24th day of August, 1898.

(Signed:) GEORGE VANKIRK,
W. B. HUNTER,
W. F. BUDLONG,
Horticultural Commissioners.

In the Superior Court of the County of Riverside, State of California.

THE COUNTY OF RIVERSIDE, *Plaintiff*,
vs.
A. BUTCHER, *Defendant*.
} DEMURRER.

Now comes the defendant, A. Butcher, and demurs to the plaintiff's complaint herein on the following grounds:

I. That said complaint does not state facts sufficient to constitute a cause of action.

II. That said complaint does not, nor does any so-called cause of action, paragraph or phrase therein contained, separately or collectively taken together, state facts sufficient to constitute a cause of action.

III. That said complaint is uncertain in this, that it cannot be told therefrom on what part of the premises described in said complaint the trees or orchard were situated, or whether said orchard covered the whole of said premises or only a part, and if a part only, what part.

IV. That said complaint is unintelligible for the same reason.

V. That said complaint is ambiguous for the same reason.

VI. That said complaint is uncertain in this, that it cannot be told therefrom in what manner or to what extent said red scale was eradicated, or that it was eradicated at all.

VII. That said complaint is unintelligible for the same reason.

VIII. That said complaint is ambiguous for the same reason.

IX. That said complaint is uncertain in this, that it cannot be told therefrom that the notice mentioned in paragraph six of said complaint was ever served on defendant, or how or by whom said notice was served.

X. That said complaint is unintelligible for the same reason.

XI. That said complaint is ambiguous for the same reason.

XII. That plaintiff has no capacity to sue or maintain this action.

XIII. That this Court has no jurisdiction of the subject of this action.

Wherefore, defendant prays that he go hence with his costs.

P. FERGUSON,
Defendant's Attorney.

In the Superior Court of the County of Riverside, State of California.

THE COUNTY OF RIVERSIDE, *Plaintiff*,
vs.
A. BUTCHER, *Defendant*.
} **JUDGMENT ON DEMURRER.**

This cause coming on regularly to be heard before the Court on the nineteenth day of June, 1899, on the demurrer and complaint, and cause submitted to the Court for decision.

Whereupon the Court, after due deliberation, sustained said demurrer without leave to amend.

Wherefore, by reason of the law and the foregoing, it is ordered, adjudged, and decreed that plaintiff take nothing by said action, that the said action be herein dismissed.

It is therefore ordered, adjudged, and decreed that the defendant, Arthur Butcher, do have and recover from the plaintiff, the County of Riverside, his costs and disbursements

herein, amounting to the sum of three and fifty one-hundredths dollars.

Done in open court, this fourth day of November, eighteen hundred and ninety-nine.

J. S. NOYES, Judge.

L. A. No. 880. Department Two. July 5, 1901.

THE COUNTY OF RIVERSIDE,
Plaintiff and Appellant,
vs.
ARTHUR BUTCHER,
Defendant and Respondent.

DECISION OF THE SUPREME COURT.

HORTICULTURAL ACT—DESTRUCTION OF SCALE AND INSECTS—CONSTITUTIONALITY OF ACT.—The Act of Legislature of March 3, 1897, entitled "An Act to promote the horticultural interests of the State," etc. (Stats. 1897, p. 244), was held to be constitutional in the case of *Los Angeles* vs. *Spencer*, 126 Cal. 670.

FORECLOSURE OF LIEN—HORTICULTURAL ACT—NOTICE TO REMOVE SCALES—SERVICE.—In an action by a county under the Act of March 3, 1897, to foreclose a lien for money paid out by plaintiff for destroying certain scale and insects found upon the trees in defendant's orchard, the notice required to be given by the statute is sufficient where it contains a description of the premises, the name of the owner, the amount claimed, that it is for labor bestowed and materials in eradicating the insects upon the orchard of the defendant; and an allegation in the complaint that the notice was served on the person in charge of and in possession of the premises is sufficient. A statement in the notice that plaintiff claimed the benefit of the law relative to liens of mechanics and others on real property does not violate it; this may be treated as surplusage, and the same may be said of a prayer for a personal judgment.

HORTICULTURAL ACT—WHEN LIEN ACCRUES—TIME FOR FILING NOTICE.—The right of a county to a lien for money paid for the destruction of scales and insects in an orchard, under the Act of March 3, 1897, accrues at the time the money is paid, and the notice of lien may be filed within thirty days from that time.

Appeal from the Superior Court of Riverside County—J. S. Noyes, Judge.

For Appellant, Lyman Evans.

For Respondent, P. Ferguson.

The court below sustained a demurrer to plaintiff's complaint, without leave to amend, and this appeal is from the judgment for the purpose of reviewing the order sustaining the demurrer.

The action was brought to foreclose a lien for money paid out by plaintiff for destroying certain scale and other insects found upon the trees in defendant's orchard, the lien being

claimed under the provisions of the Act of March 3, 1897, entitled "An Act to promote the horticultural interests of the State by providing County Boards of Horticulture," etc. (Stats. 1897, p. 244).

It is said by appellant that the court below sustained the demurrer upon the ground that the Act was unconstitutional, and as the court denied the plaintiff leave to amend, it would seem that the contention is correct. The point may be regarded as settled by this court in *County of Los Angeles* vs. *Spencer*, 126 Cal. 670, which case was decided a few days after the court made the order sustaining the demurrer in this case. We regard the reasoning of the court in that case as correct, and it is not necessary to further discuss the question. Other objections, however, are made to the complaint, which we will notice in the order presented. It is claimed that the complaint fails to show that proper notice was served upon defendant requiring him to eradicate and destroy the scale prior to the expense incurred by plaintiff. The Act provides, in speaking of the duties of the County Board of Horticultural Commissioners: "They shall notify the owner or owners, or person or persons in charge or in possession of the said places or orchards, * * * that the same are infested with said insects, or other pests, * * * and they shall require such person or persons to eradicate or destroy the said insects * * * within a certain time to be specified. Said notice may be served upon the person or persons, or either of them, owning, or having charge, or having possession of such infested place * * * by any commissioner, or by any person deputed by the said commissioners for that purpose, or they may be served in the same manner as a summons in a civil action."

The complaint alleges that the board "caused a notice to be served upon W. Miller, in charge of, and in possession of, said premises and orchard for the defendant, as his agent, requiring said defendant and agent to eradicate or destroy the said scale and insects so found upon said trees within ten days after the service of said notice."

A copy of the notice is attached to the complaint as an exhibit, and the copy shows that the notice contained fully all matters required by the statute.

We think the allegation as to service of notice sufficient. It shows that the person served was the person in charge of and

in possession of the premises. This is all that the statute requires. The allegation shows that the notice was served substantially as required by the statute.

It is further contended that the complaint fails to show that the notice of lien was filed within thirty days after the right of lien accrued. This contention is based upon the fact that the complaint shows that the labor of destroying the scale was done in the latter part of September, 1898, and that the notice of lien was not filed until January, 1899. The statute provides that the expense shall be a county charge and the Board of Supervisors shall allow and pay the same out of the general fund of the county. "Any and all sums so paid shall be and become a lien on the property. * * * A notice of such lien shall be filed and recorded in the office of the County Recorder of the county in which the said property and premises are situated within thirty days after the right to the lien has accrued."

The right to the lien accrued to the county at the time it paid the amount. It then became a lien upon the property, and not till then. After the lien so accrued the county had thirty days in which to file its notice. It is alleged that the county paid the amount December 9, 1898, and that it filed the lien January 7, 1899. This was within thirty days after the right to the lien accrued.

The notice of lien was sufficient when signed and verified by the members of the Board of Commissioners stating that the county claimed a lien for the amount of expense. It contains a description of the premises, the name of the owner, the amount claimed, that it is for labor bestowed and materials furnished in eradicating the insects upon the orchard of defendant. This was all that was required by the statute. In fact, the statute is entirely silent as to the form, contents, or requisites of the notice. It simply says a "notice of such lien shall be filed and recorded." The complaint shows that the notice was filed and recorded. The fact that the notice stated that the plaintiff claimed the benefit of the law relative to liens of mechanics and others upon the real property did not vitiate it. This part of the notice may be regarded as surplusage. The same may be said of the prayer for a personal judgment. The prayer is no part of the complaint, and, in addition to the prayer for personal judgment, it asks that

the amount may be declared a lien, and that the premises be sold to satisfy such lien.

We recommend that the judgment be reversed, and the cause remanded with directions to the lower court to overrule the demurrer and allow defendant a reasonable time to answer.

COOPER, C.

We concur:

CHIPMAN, C.
HAYNES, C.

For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded with directions to the lower court to overrule the demurrer and allow defendant a reasonable time to answer.

HENSHAW, J.
McFARLAND, J.
TEMPLE, J.

POWERS OF HORTICULTURAL COMMISSIONERS DEFINED.

In the Superior Court of the County of Tehama,
State of California.

OREGON NURSERY CO., LIMITED (A CORPORATION), *Plaintiff*,
vs.
R. W. COATS AND A. W. SAMSON, *Defendants*.
} OPINION.

The plaintiff, in January of this year, shipped from the State of Oregon into this county a large number of fruit trees—nursery stock.

Believing the defendants were the proper persons to inspect said trees, the agent of the plaintiff notified the defendants of their arrival.

The defendants examined said trees and found some of them infested with peach-root borers, some with sour sap, some whose roots had been frozen, and some with root knot.

That the trees were so infested and diseased I think is shown by a preponderance of evidence.

Of the total number of trees shipped only a small percentage

were condemned by defendants, and of those condemned only a part were destroyed.

It may be that in inspecting so large a number of trees, the defendants occasionally made a mistake, and condemned a tree that should have been passed. It would be strange if they did not, but the evidence satisfies me that in the main all the trees condemned, and particularly all the trees destroyed, were, by reason of borers or disease, unfit to sell or plant and had no market value.

Entertaining these views I should, without further discussion, order judgment for defendant, were it not that a vital question still remains to be solved, viz: Were the defendants authorized by law to inspect the trees at all, and if so, were they authorized to destroy any or all of those condemned?

Upon this branch of the case I shall express my views somewhat at length, both because a correct decision of this case justifies it and because such discussion may assist the Board of Supervisors and County Horticultural Commission in the discharge of their duty, with reference to other cases that may arise.

When a Board of Supervisors or any other local board attempts to do any act with reference to the property of an individual it must be able to show its authority to do so, by some law clearly conferring such power.

The defendants claimed the right to inspect, condemn, and destroy the trees by virtue of holding the official position of Horticultural Inspectors for Tehama County. It is true one of the defendants claimed to hold the position of Quarantine Guardian, but as he testified positively that in what he did concerning these trees he did not act as Quarantine Guardian, but that in all he did he was acting as inspector, the validity of his appointment as such guardian and his powers and duties as such need not be considered.

So far as I am advised there are now in force three Acts of the Legislature relating to the protection of the fruit interests of the State.

The first I shall notice is an Act passed in 1883 (Statutes of 1883, p. 289). This Act provides for a State Board of Horticultural Commissioners, consisting of nine members, to be appointed by the Governor, two from the State at large and one from each of seven districts. The provisions of this Act,

so far as necessary to be noticed at this time, are found in Sections 5 and 7.

Section 5 provides that that State Board, for the purpose of preventing the spread of contagious diseases among fruit trees and fruit, and for the prevention, treatment, cure, extirpation of fruit pests and the diseases of fruit and fruit trees, and for the disinfection of grafts, scions, orchards, débris, etc., dangerous to orchards, fruit, and fruit trees, shall make regulations for the inspection and disinfection thereof, which regulations shall be circulated in printed form among the fruit-growers of the State, and shall be published and posted, etc. Said regulations, when posted in three public places of the county, shall be binding on all.

Section 7 provides that the State Board may appoint as many quarantine officers as may be needed to carry out the provisions of this Act, whose duty it shall be to see that the regulations of the board are enforced and carried out.

Whether, acting under this statute, the State Board has ever adopted any regulations, or printed or posted them, if adopted, I am not informed. The court cannot take judicial notice, without proof, of its proceedings.

The next Act to which attention is called is the Act of 1897 (Statutes of 1897, Chapter 183).

The first section of this Act provides where and under what conditions the Board of Supervisors of a county may appoint a County Board of Horticultural Commissioners. It may make such appointment "whenever a petition is presented signed by twenty-five or more persons, each of whom is a resident freeholder and possessor of an orchard, stating that certain or all orchards or nurseries or trees of any variety are infested with scale insects of any kind injurious to fruit trees and vines, codling moth, or other insects that are destructive to trees."

It is the law of this State that whenever the Legislature confers power upon a Board of Supervisors or other board, and prescribes the circumstances under which or the manner in which such power is to be exercised, the circumstances must exist before the board can act at all, and if it act it must do so in the manner pointed out by the statute.

As was said by the Supreme Court of this State, *In re Grovestreet*, 61 Cal. 449: "It was for the Legislature to pre-

scribe, and the Legislature has prescribed, what the petition shall contain—until a petition is presented containing substantially all that the law declares shall be inserted in a petition to initiate the proceedings, the counsel has no power or jurisdiction to act." * * *

The statute says the Board of Supervisors may appoint a County Board of Horticulture, first, when a petition is presented signed by twenty-five resident freeholders and possessors of orchards; and, second, when such petition states that certain or all orchards or nurseries or trees are infested with scale insects of any kind injurious to fruit trees and vines, codling moth or other insects that are destructive of trees.

The petition presented to the Board asking for the appointment of a County Board of Horticulture complied with the first of the above conditions. It was signed by twenty-five persons having the qualifications prescribed by the statute; but it did not, even in substance, comply with the second condition. It did not state that any orchard or trees in Tehama County were infested with scale insects injurious to trees, codling moth or any insect destructive of fruit trees.

All the petition stated upon this vital point was the following: "We are credibly informed and wholly aware that there exist throughout this county a great many insects and pests of various kinds, and that they are multiplying at an alarming rate."

This is not a statement that any orchard or all orchards or trees are infested with codling moth, scale insects, or any insects destructive of fruit trees.

Of course there are insects and pests in Tehama County, but the statute said the petition must state that there are insects or pests here *injurious to fruit trees.*

It will be admitted, I presume, that not all insects and pests are injurious to fruit trees.

As the presentation of a petition containing the matters the statute requires was the thing necessary to give the board jurisdiction to make any appointment, it follows that the order of the board, based upon the above petition, appointing a County Board of Horticulture, was void, and from a legal standpoint no board was appointed.

As the Board of Supervisors may hereafter conclude, upon a proper petition presented, to appoint a Board of Horticulture, I

deem it not improper to offer some suggestions as to what the scope of the authority of such Board of Horticulture will be when legally appointed.

The second section of the Act of 1897 states some of the duties of such board.

When it deems it necessary it shall cause an inspection to be made of any orchard or nursery, or trees, plants, etc., and if found infested with scale insects or codling moth or other pests injurious to fruit, plant or vegetable life, or with their eggs or larvæ, they shall notify the owner or person in possession thereof that they are infested with such pests, insects, etc., and shall require such person to eradicate or destroy said insects or other pests, their eggs or larvæ, within a certain time to be specified.

It then provides that if the owner or person in possession of said orchard or trees shall refuse or neglect to abate the pests, insects, etc., within the time specified, then it shall be the duty of the County Board of Horticulture to cause said nuisance to be at once abated, by eradicating or destroying said insects or other pests, or their eggs or larvæ.

"The expense thereof shall be a county charge, and the Board of Supervisors shall allow and pay the same out of the general fund of the county; and any or all sum or sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this Act, and may be recovered in an action against such property and premises."

The above seems to be the full measure of power of the County Board of Horticulture in the matter of dealing with the trees or orchards of other persons.

When we analyze this section we reach the following results: The County Board of Horticulture has power to inspect any and all orchards and trees in the county, and if it finds them infested with scale insects or codling moth or other pests injurious to fruit, plants, vegetables, trees, or vines, or with their eggs or larvæ, it shall notify the owner or person in possession and require him to eradicate or destroy said insects or other pests, or their eggs or larvæ, within a certain time to be specified.

If the owner or person in possession of the trees or orchard neglects or refuses to abate the same within the time specified,

the commissioners shall cause said nuisance to be at once abated by destroying or eradicating said insects or other pests, or their eggs or larvæ.

It will be noticed that no authority is anywhere in the statute given to destroy trees or orchards. The only authority given to destroy is to destroy the pests or insects. Nothing is said about destroying trees. The language is: "It shall be the duty of said commissioners to cause said nuisance to be at once abated by *eradicating* or *destroying* said *insects* or *other pests*, their *eggs* or *larvæ*."

Whether they would be authorized in any case to destroy trees would probably depend upon circumstances. It is their duty to eradicate or destroy the insects and pests. If a tree or trees were so infested with insects or pests, their eggs or larvæ, as to render it impracticable to eradicate or destroy said insects or pests without destroying the trees, in such case I think the board would be justified in destroying the trees.

But it is clear that the statute in no case confers authority to destroy any trees except such as are infested with insects, borers, or fruit pests. Nor do I know of any good reason why such power should be conferred.

Take the case of trees afflicted with sour sap. All witnesses on both sides testify that it is a disease of the individual tree, produced by local conditions of soil, moisture, or temperature. That it is neither contagious nor infectious. It will not communicate to nor infect other trees in the same orchard or nursery.

This being so, no good reason can be suggested why, if commissioners find a tree or row of trees in my orchard afflicted with sour sap, they should destroy it or them. It will not spread to any more of my trees nor to those of my neighbors, and if I want to take care of and try to grow a sick tree I see no reason why the State should not permit me to do so. Any way, it certainly has not conferred authority upon any one to destroy such a tree without the consent of the owner.

The same rule must apply to nursery stock offered for sale. After the commissioners have inspected it and found trees afflicted with sour sap and informed the intended purchaser, if he is silly enough to plant them he should be permitted to do so.

These remarks do not apply to trees infested with insects and pests injurious to fruit trees. No one should be permitted to buy, sell, plant, grow, or keep in his possession trees infested

with insects, pests, etc., that will propagate, spread, grow, and infest and destroy the orchards of other people.

The third section of this Act of 1897 gives the County Board of Horticulture power to divide the county into districts and to appoint a local inspector for each district.

The fourth section makes it the duty of the County Board of Horticulture to keep a record of its proceedings.

Acting under these two sections, if the Board of County Commissioners, when appointed, desires to appoint local inspectors, it should meet as a board and divide the county into districts, by section lines or otherwise, fixing the boundaries of each district, and enter it upon the records of its proceedings. If it appoints an inspector for each district, it should do so at a meeting of the board, and enter the names and districts for which appointments are made, upon the minutes of its proceedings required by law to be kept.

Before leaving this statute of 1897 I desire to make some general suggestions concerning it:

It is obvious that it was not passed expressly, if at all, for the purpose of providing for the inspection of nursery trees offered for sale. The Legislature had in mind that there might be in a county an orchard infested with insects and pests destructive of fruit trees, which if not eradicated would spread and injure other trees and orchards, and where the owner either neglected or refused to eradicate them, thereby endangering the property of neighbors. It was to force such an owner to eradicate such pests and insects, and if he did not, to give the County Commissioners power to do it and make the expense a lien upon his orchard, that the statute was passed.

This is apparent from the first section. To get commissioners appointed a petition must be presented stating that certain or all orchards or nurseries or trees are infested, etc. The board would have no power to appoint, if the petition alleged that all trees and orchards in the county were free of pests and insects, but petitioners believed some one was about to bring infested trees in from another county or state.

That the Legislature was legislating for orchards and not for nursery trees out of ground is obvious from Section 2, which provides that the county shall have a lien upon the property for the expense of eradicating and destroying insects and pests.

After the county officers had condemned a lot of nursery

trees, because infested with root-borers, etc., it would look silly for the county to offer such trees at public auction to pay the expenses of eradicating the pests from them.

But however all this may be, it is clear that if the Act of 1897 did confer power upon County Boards of Horticulture and local inspectors to inspect and condemn nursery stock shipped in from other States, such authority was taken away by the Act of 1899, and *conferred exclusively upon the State Board of Horticulture and the Quarantine Guardians appointed by it.*

The rule has been announced by our Supreme Court that whenever the Legislature purports to pass an Act dealing with the whole of a particular subject-matter, such Act repeals, by implication, all former Acts upon the same subject.

The Act of 1899 is directed exclusively to the inspection of nursery stock shipped into this State from places without the State.

The first section provides that any person who shall bring any nursery stock into this State shall notify the State Horticultural Officer or the Quarantine Guardian of the district or county of its arrival, and shall hold the same, without unnecessarily moving the same, for the inspection of such State Horticultural Officer or Quarantine Guardian. If there is no Quarantine Guardian or State Horticultural Officer in the county where such stock is received, it shall be the duty of the person having said stock to notify the State Board of Horticulture, who shall make immediate arrangement for its inspection.

The third section provides that when any shipment of nursery stock brought into this State is found infested with injurious insects, their eggs, larvæ, or pupæ, or infested with tree, plant, or fruit disease or diseases, the entire shipment shall be disinfected at the expense of the owner. After such disinfection it shall be detained in quarantine the necessary time to determine the result of such disinfection. If the disinfection destroys all insects and their eggs, and eradicates all diseases and prevents contagion, the trees shall then be released from quarantine. (What shall be done with the trees if the disinfection shall not prove a success the statute nowhere states.)

It was clearly the purpose and intent of the Legislature, in passing this Act of 1899, to place the inspection, disinfection,

quarantining, etc., of nursery stock shipped into this State in the hands and jurisdiction of a State Board of Horticulture, to be by it, or by a quarantine guardian appointed by it, inspected, etc., and to take away from the County Boards of Horticulture and local inspectors all the authority to inspect, condemn, or destroy such imported stock.

The foregoing are all the laws of the State called to my attention or that I have been able to find bearing upon the facts and circumstances developed by the trial of this case. It is a crude and unsatisfactory mass of legislation upon a very important subject. The fruit industry is one of the largest and most important in the State, and it would seem that some plain, simple legislation upon so important a subject could be formulated and passed.

From this review of the law I conclude:

1. That by reason of defective petition the Board of Supervisors never acquired jurisdiction to appoint a County Board of Horticulture, and that its attempt to do so was void.

2. That defendants were not legally appointed local or district inspectors, because there was no Horticultural Commission to make the appointment, and because if there was such a board it did not attempt to make such appointment at any time when in session as a board, nor did it make any record of such appointment.

3. That County Boards of Horticulture and Inspectors, by reason of the passage of the Act of 1899, have no authority or power to inspect, condemn, or destroy a nursery stock shipped into this State from another State; but the duty and power to inspect such a stock is, by the Act of 1899, vested exclusively in the State Board of Horticulture and in the quarantine guardians appointed by it.

4. That any one shipping nursery stock into this county from any place without the State must, before moving it, notify the State Quarantine Officer of the district of the arrival of the trees; if there is no State Quarantine Officer for the district he shall notify the State Board of Horticulture, who shall appoint some one to inspect the trees.

5. That no power has been conferred either on County or State Board to destroy any trees unless they are infested with fruit insects or pests, or infested with some contagious or infectious disease.

That sour sap in a tree furnishes no justification for the destruction, as it is neither infectious nor contagious.

6. If a County Board of Horticulture is appointed by the Board of Supervisors, and the county divided into districts and local inspectors appointed, then the State Board can appoint the members of the County Board and the local inspectors State Quarantine Guardians. Then the County Board and local inspectors acting as quarantine guardians would have authority to inspect the nursery stock shipped into the county from without the State.

7. The evidence shows that the defendants in all their acts concerning plaintiff's trees acted in good faith, believing that they had been legally appointed and that it was their duty to do what they did.

Because the defendants were not legally appointed and were not authorized to destroy the trees I am asked to enter up judgment for the full value of a sound merchantable stock of trees.

This I must decline to do.

The plaintiff is only entitled to the market value of the trees destroyed. The evidence is to the effect that the trees destroyed, by reason of the presence of peach-root borers, sour sap, frozen roots, root knot, etc., were unfit to plant, were worthless, and had no market value.

The measure of the plaintiff's damage is the value in the market of the trees destroyed, and no more.

Although of no value, as the defendants were not authorized to destroy them, plaintiff is entitled to nominal damages, fixed at one dollar.

A permanent injunction is asked for. I do not think a case is made out for such an order. It does not appear that plaintiff has any nursery stock in this county at this time, nor that he will have in the future. Should he bring any in, the defendants may then be quarantine guardians and have a right to inspect, and they may not attempt to inspect if not appointed quarantine guardians.

The findings and judgment will be filed in accordance with this opinion.

JOHN F. ELLISON, Judge.

In the Superior Court of the County of Tehama,
State of California.

OREGON NURSERY CO., LIMITED (A CORPORATION), *Plaintiff*,
vs.
R. W. COATS AND A. W. SAMSON, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial on the 18th day of June, 1901, A. M. McCoy and John J. Wells appearing as attorneys for the plaintiff and M. G. Gill and G. H. Chase for the defendants.

Whereupon oral and documentary evidence was introduced, the cause argued by counsel for the respective parties, and submitted to the Court for its decision.

From the evidence the Court finds the facts as follows, to wit:

I. That at all the times mentioned in the complaint the plaintiff was and now is a corporation organized under the laws of the State of Oregon.

II. That the defendant R. W. Coats claims to be an inspector appointed by the County Board of Horticultural Commissioners of Tehama County, State of California, and the defendant A. W. Samson claims to be such inspector and also claims to be a quarantine guardian appointed by the State Board of Horticulture of the State of California.

III. That on or about the 19th day of January, 1901, the plaintiff brought into the State of California and into Tehama County a shipment of fruit trees of a value exceeding one thousand dollars.

That a portion of said trees were brought to the town of Red Bluff and a portion of said trees were brought to the town of Corning and a portion of said trees were brought to the town of Vina, all within said County of Tehama.

That plaintiff immediately and within twenty-four hours after such arrival notified the defendants and held the said fruit trees without unnecessarily removing the same or placing them where they might be harmful, that they might be immediately inspected by said defendants; that by permission of said defendants a portion of said fruit trees, so brought to the town of Red Bluff, were removed from said town to a place

within said county of Tehama, about three miles distant from said town.

IV. That a large number of said trees were infested with injurious insects and their larvæ, and infested with tree diseases.

That none of said trees were infested with any species of injurious insects, their eggs, larvæ, or pupæ, not existing in the orchards, vineyards, gardens, or farms of California.

V. That the said defendants claiming to be such inspectors as aforesaid did thereafter inspect said trees situate at the several points above mentioned.

That on making said inspection the said defendants found that said trees and many of them were infested with injurious insects, their eggs and larvæ, and infested with tree, plant, and fruit diseases.

They did not find, nor did either of them find, the said trees or any of them infested with any species of injurious insects, or their eggs, larvæ, or pupæ, not existing in the orchards, vineyards, gardens, or farms of California.

That said defendants did notify the agent of plaintiff in charge of said trees that the same were infested with insects and pests injurious to fruit, plants, vegetables, trees, and vines, and with their larvæ, but did not nor did either of them require plaintiff or its agent to eradicate or destroy such insects or other pests, or their eggs or larvæ, within any time specified, or at all.

VI. That said defendants, after making said inspection, did condemn a large number of said trees as being infested, but did not do so without exercising proper discretion and judgment nor without just cause therefor.

That said defendants did not, nor still do not, decline or refuse to say what, if any, injurious insects, or what, if any, eggs, larvæ, or pupæ, were found on said trees.

On January 19, 1901, defendant A. W. Samson gave the certificate set forth in subdivision VI of the amended complaint.

That of the trees so condemned 9 were of the trees inspected at Red Bluff, and 374 were of the trees inspected at the town of Corning, and 159 were of the trees inspected at the town of Vina, 2,318 were of the trees inspected at the point above-named about three miles distant from the town of Red Bluff.

That except as to the 2,318 trees above mentioned, the defendants did not refuse to allow plaintiff to remove the trees so condemned or to allow the plaintiff to use or plant or cause the same to be planted.

Of the trees so condemned and not destroyed (as hereafter found) the defendants neither consented nor refused to allow plaintiff to remove them from the place where condemned, or to use or plant the same.

That the defendants did not disinfect any of the trees so condemned by them.

VII. That at the time of said inspection and at the time said trees were condemned, they were diseased, infested with root-borers, sour sap, and root knot, and unfit to plant, and by reason of their condition had no market value whatever and were not of the value of $476.03, nor of any value whatever.

VIII. That of the trees so condemned the said defendants did, on or about the 22d day of January, 1901, and without giving plaintiff or its agent the option whether said fruit trees should be removed from the State or destroyed, destroyed 2,020 in number of said trees by burning them.

That they destroyed them because they were infested with root-borers and sour sap and other diseases of fruit trees, and without other cause therefor.

That defendants did not refuse to allow plaintiff to care for 296, or any number of said trees. That they were exposed to the wind and died.

IX. That the trees so destroyed as set forth in finding VIII by burning and exposure to the wind were not of the value of $388.14, nor of any value whatever.

X. That said defendants threatened to destroy all of said trees so condemned, but which had not been destroyed when this action was begun; but as all of said trees had either died or been destroyed prior to the trial of this action, the issue of a permanent injunction would be a useless act.

XI. That said defendants were not nor was either of them ever appointed inspector by the County Board of Horticultural Commissioners of Tehama County, and they were not nor was either of them at any time such inspector, and the defendant Samson was not at any time mentioned herein a quarantine guardian appointed by the horticultural board of the State.

XII. That by reason of the facts above set forth plaintiff has not been damaged in the sum of $476.03, or in any sum whatever.

XIII. That of the trees burned some were infested with peach-root borers, which is an insect pest injurious to fruit trees and orchards and infectious; but only a small per cent of said trees were thus infested. That the others burned were affected with sour sap, which is a condition or disease of the individual tree, neither infectious nor contagious.

As conclusions of law from the foregoing facts the Court finds:

That plaintiff is entitled to nominal damages in the sum of one dollar.

That plaintiff is not entitled to a permanent injunction.

That each side should pay its or their own costs.

Let judgment be entered accordingly.

JOHN F. ELLISON, Judge.

POWERS OF COUNTY HORTICULTURAL COMMISSIONERS AND STATE BOARD OF HORTICULTURE.

Opinion of Attorney-General Tirey L. Ford.

SAN FRANCISCO, CAL., September 24, 1901.

MR. ALEXANDER CRAW, *State Board of Horticulture, Clay Street Dock, San Francisco, Cal.:*

DEAR SIR: Your favor of July 8, 1901, received, but owing to the press of other official matters which I had in hand at the time of the receipt of your communication, I have only just been able to give your letter my consideration.

You say: "A serious and contagious disease of olive trees, known as *Bacillus oleæ*, has been found in several counties of this State, introduced several years ago from Europe. There is no known remedy for the disease, and the Board desires to know (1) if the County Horticultural Commissioners have power to order all such diseased trees destroyed, or to destroy them, under the last clause of Section 2 of the law of 1897; (2) in counties where no County Board of Horticulture exists, has the State Board of Horticulture any legal right to cause

the condemnation or destruction of such diseased trees through the courts, or otherwise?"

In reply to your first question, permit me to say that the State Board of Horticulture was created by Act of March 18, 1883 (Statutes 1883, p. 289). The Act was amended in 1889 (Statutes 1889, p. 89). The amended Act authorizing the creation of County Boards of Horticulture is the Act of March 31, 1897 (Statutes 1897, p. 244). The Act provides for the creation of the County Boards of Horticultural Commissioners. By Section 2 of said Act it is made the duty of the board to cause an inspection to be made of any orchards or nurseries, or trees, plants, etc., and if found infested with any pest injurious to the fruit, trees, plants, vegetables, etc., or with their eggs or larvæ, they shall notify the owner thereof to destroy the said pests, or their eggs or larvæ.

The Act then reads: "Any and all such places, or orchards, or nurseries, or trees, plants, shrubs, vegetables, vines, fruit, or articles thus infested, are hereby adjudged and declared to be a public nuisance. * * * It shall be the duty of the County Board of Horticultural Commissioners to cause said nuisance to be at once abated by eradicating or destroying said insects or other pests, or their eggs or larvæ."

After providing for the expense entailed in the destruction of the pests, the Act declares: "The County Board of Horticultural Commissioners is hereby vested with power to cause any and all such nuisances to be at once abated in a summary manner."

The remedies against a public nuisance are: (1) Indictment or information; (2) A civil action; (3) Abatement. (Civil Code, Sec. 3491.)

A public nuisance may be abated by any public body or officer authorized thereunto by law. (Section 3494, Civil Code.)

Any person may abate a public nuisance which is especially injurious to him, by removing or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace or doing unnecessary injury. (Section 3495, Civil Code.)

There is a diversity of opinion among the text-writers upon the right of a private individual to abate a public nuisance from which he sustains no special injury beyond that common to the public at large.

Some maintain the position that he has such right.

1 Hilliard on Torts, 605;

1 Bishop's Criminal Law, 828.

While others maintain that he has no such right.

Wood on Nuisances, 732 *et seq.*;

Cooley on Torts, Sec. 46.

At common law he could do so.

3 Blackstone's Com., 5.

In California, the case of *Gunter* vs. *Geary*, 1 Cal. 462, sustains the affirmative of this question, though it does not seem to have been again cited in this State to the point.

However, Section 3495 of the Civil Code, *supra*, settles the question, in so far as this State is concerned, against the right of a private person to abate the nuisance summarily, unless he has suffered some personal injury.

Section 3495 of the Civil Code, *supra*, however, gives a public body or officer this right when authorized by law.

The question then resolves itself into the following: Is the County Board of Horticulture authorized, by law, to summarily abate that which the law has declared to be a public nuisance?

As stated, the statute makes the infested trees, etc., a public or common nuisance. This the Legislature has the right to do.

County of Los Angeles vs. *Spencer*, 126 Cal. 670;

Lawton vs. *Steele*, 119 N. Y. 226; affirmed 152 U. S. 133.

It has given the County Board of Horticultural Commissioners power to eradicate and destroy the insects, or their eggs or larvæ, and, as stated above, declares "all infested places, orchards, or nurseries, or trees, plants, etc., thus infested * * * to be a public nuisance."

The board is then given power to summarily abate the common or public nuisance.

In the absence of anything further, this would be the authority of law referred to in Section 3495, *supra*, of the Civil Code.

In the case of *Lawton* vs. *Steele*, *supra*, the Court, in speaking of the remedies for the abatement of nuisances, says at page 237: "The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy

by judicial prosecution, *in rem* or *in personam*, is not, we conceive, exclusive, where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished."

In the case of *County of Los Angeles* vs. *Spencer*, *supra*, the Supreme Court was considering the constitutionality of the Acts here under discussion, and sustained them. After holding that the Acts in question were a proper exercise of the police power, the Commissioner, at page 674, says: "In this connection it may be well to observe that the statute does not authorize any injury to, or destruction of property, but on the contrary its provisions are beneficial to the very property upon which it operates."

This expression of opinion is mere dictum and unnecessary to the decision. The point involved was neither argued nor referred to in the briefs in the case. It is true that the scope of the Act is "to promote and protect the horticultural interests of the State," and in certain portions of the Act it is said that the commissioners shall abate the nuisance by "eradicating or destroying said insects or other pests, or their eggs or larvæ." But, as said in the case under consideration, on page 673: "It is known that the existence of the fruit industry in the State depends upon the suppression and destruction of the pests mentioned in the statute."

In *Lawton* vs. *Steele*, *supra*, at page 238, it is said, in speaking of the power of summary abatement: "But the remedy of summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it, and here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it exists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description."

Again, at page 239: "But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend. 571), or the nets in the present case, the Legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the

property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner."

In *Bateman* vs. *Colgan*, 111 Cal. 587, this general principle is referred to as follows: "It is further objected that the provisions of Section 2524 could not have been intended to apply to a work of this character, because the Board of Harbor Commissioners is not authorized thereby to employ an architect, which it is argued is, in the essential nature of things, rendered necessary in the construction of such a building. *But, where power is given to perform an act*, the authority to employ all necessary means to accomplish the end is always one of the implications of the law, and, notwithstanding the omission of any special provision to that end, it was competent for the board, in carrying out the purposes of the Act, to employ all necessary means to fulfill its requirements."

If, therefore, injury unavoidably follows the summary eradication and destruction of the insects and pests, or their eggs or larvæ (the thing authorized by statute to be done), yet if such eradication and destruction are done without wanton or unnecessary injury, there is no legal interference with the rights of the owner of the property affected.

It must be borne in mind, however, that the board will be held to a strict account for any unnecessary destruction of property, and it will, therefore, be entirely a question of fact for them to determine, in each instance, just how far it is necessary for them to exercise their powers.

In reply to your second question, I have to say that the Act creating and defining the powers of the said Board of Horticultural Commissioners does not give them the powers conferred upon the County Board of Horticultural Commissioners. Their power seems to be confined to the dissemination of knowledge and the disinfection of suspected materials dangerous to orchards and trees, to prevent the spread of contagious diseases, and the establishment of quarantine regulations. But nowhere is a power given to destroy trees or abate nuisances.

In the absence of said statutory provisions, I am of the opinion that they have no such power.

Very truly yours,

TIREY L. FORD, Attorney-General.
By WM. M. ABBOTT, Deputy.

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